

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

ARON GEIGER,)	
)	
Plaintiff,)	4:06CV3055
)	
v.)	
)	
JAMES L. COX JR., an)	MEMORANDUM AND ORDER
individual, and ROSSI, COX &)	
VUCINOVICH, P.C., successor)	
in interest to ROSSI, COX,)	
KIKER & INDERWISH, P.C.,)	
)	
Defendants.)	

Nonparty Union Pacific Railroad Company ("UP") has filed a motion to quash or modify a subpoena served upon it by plaintiff. The subpoena seeks entry and inspection of the UP's Bailey Yard in North Platte, Nebraska by the plaintiff, his attorney, and his expert witness, Dr. Michael Shinnick, to allow "inspection, surveillance, recording [including pictures and video] and measurement" of similar rail cars to that involved in the accident giving rise to the plaintiff's earlier FELA claim against UP, and the pulling of "cut lever pins" of such cars both on and off the "hump" at the Bailey Yard.

UP argues that compliance with the subpoena would cause serious safety concerns to plaintiff, his attorney, Dr. Shinnick, and UP employees; would interfere with UP's business operations possibly causing delays in the movement of trains; and would interfere with UP's labor contract with the United Transportation Union. Filing 53. Plaintiff argues that Dr. Shinnick could quickly train a UP employee to use his handheld "dynamometer" device to measure force associated with operating a cut lever pin, thus obviating the necessity of non-UP, non-union "work," and that such use would not cause safety risks and would not

interfere with UP's operations. Plaintiff argues that such measurements are necessary to rebut the anticipated use of the report of UP's expert in the FELA case, George Page. Filing 64 at 3. UP replies that a subpoena to a non-party does not require the non-party to perform "work" for the party serving the subpoena, and further, Dr. Shinnick acknowledges that Mr. Page's opinions were based on information not acquired from cars on the "hump." Filing 68 at 2, citing paragraph 9 of Dr. Shinnick's affidavit, Filing 65-2. ("9. That switching railcars over a hump present [sic] additional forces that are unaccounted for in previous report prepared for the Union Pacific Railroad by its expert George Page in the original FELA action that underlies this matter."). Filing 68 at 2-3.

Fed. R. Civ. P. 45 provides for the issuance of subpoenas on non-parties for obtaining evidence and testimony. Rule 45(c)(3)(A)(iv) provides that the court may quash a subpoena that "subjects a person to undue burden." Rule 45(c)(1) requires the party serving a subpoena to "take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena" and directs the court to enforce that obligation. Rule 45(c)(2)(B) requires that if the court compels the production or inspection sought by the subpoena, the court's order must "protect any person who is not a party or an officer of a party from significant expense resulting from the inspection...commanded."

UP has filed evidence which seeks to establish that the requested inspection and testing would be disruptive of its operations and would raise safety risks, in addition to violating its labor agreement obligations. The last reason is not sufficient to prevent discovery, as the evidence does not

establish either the specific cost or burden to UP if the agreement were violated, and even if such a cost might be incurred, it might be insufficient to bar discovery of critical information, even from a nonparty. The evidence is weak on the safety issue, in that other than saying a safety risk would arise, there is no specific identification of the risk, nor how it would arise, nor its severity, nor of any steps (short of weeks of safety training) that could be taken to lessen or eliminate it. There is no intent to lessen or depreciate the railroad's concern for safety, as obviously such a concern must be paramount in its operations and rules; the lack of specificity, however, weakens the UP's position. The evidence on business disruption is stronger and more specific, even though it goes principally to efficiency of operations and accompanying expense.

Plaintiff's evidence is also weak. Other than saying the UP's evidence just isn't true, the plaintiff has presented no specific information. In addition, plaintiff has not demonstrated why it is necessary for his expert to test the forces necessary in pulling "cut lever pins" in the first place, but assuming that would lead to admissible evidence on defendant's representation of the plaintiff, why testing is particularly necessary on railcars in the "hump" area, and why pulling such pins in the maintenance area on nonmoving cars would not suffice.

Under these circumstances, and also in view of the UP's status as a nonparty, I conclude that the evidence tips in favor of UP, in that the business disruption has been shown to be significant, even if its evidence on the other matters is weak. The "snowball" effect of train delays into and out of the UP's

Bailey Yard has been shown to be great and would, if the inspection is permitted, cause the UP "undue burden." Plaintiff will be restricted to the maintenance yard railcars in accordance with UP's offer of compromise in the matter.

IT THEREFORE HEREBY IS ORDERED,

The motion to quash or modify, filing 52, is granted, and the subpoena is modified to limit plaintiff's inspection and testing to stationary railcars at the Union Pacific Maintenance Facility in North Platte, Nebraska.

DATED this 6th day of December, 2006.

BY THE COURT:

s/ *David L. Piester*

David L. Piester
United States Magistrate Judge